

2011 IL App (1st) 092657-U

FIRST DIVISION
December 30, 2011

No. 1-09-2657

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	No. 90 CR 0681
DARYL BELL,)	
)	
Defendant-Appellant.)	Honorable
)	Dennis J. Porter,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

ORDER

¶ 1 **Held:** Where the record failed to show that postconviction counsel complied with Illinois Supreme Court Rule 651(c), the dismissal of the defendant's successive postconviction petition must be reversed, and the case remanded for compliance with the rule.

¶ 2 Defendant Daryl Bell appeals from the second-stage dismissal of his successive postconviction petition. On appeal, defendant Bell contends that postconviction counsel failed to comply with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), and therefore, the dismissal of his petition must be reversed and the case remanded for compliance with Rule 651(c). The facts are taken from the record on appeal and the opinion and orders issued by this court.

¶ 3 I. PROCEDURAL HISTORY

¶ 4 Following his 1991 convictions for armed violence and possession of a controlled substance with intent to deliver, defendant Bell was sentenced to concurrent extended-term sentences of 60 years' imprisonment. On direct appeal, this court vacated his conviction and sentence for armed violence and affirmed the remaining conviction and sentence. See *People v. Bell*, 273 Ill. App. 3d 439 (1995). Defendant Bell's petition for leave to appeal to the supreme court was denied.

¶ 5 On September 4, 1996, defendant Bell filed a petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq. (West 1996) (the Act)), alleging the ineffective assistance of defense counsel and appellate counsel. The petition was dismissed as frivolous and without merit. The dismissal of the petition was affirmed by this court. *People v. Bell*, No. 1-96-1998 (1998) (*Bell I*) (unpublished order under Supreme Court Rule 23).

¶ 6 On November 14, 2000, defendant Bell filed a *pro se* motion to vacate and modify his sentence. The circuit court docketed the motion as a postconviction petition and appointed counsel to represent him. On April 13, 2001, counsel filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000) (the Code)), alleging that the

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sentence imposed by the trial court was void. The circuit court granted the State's motion to dismiss finding that, since the sentence was authorized by statute, it was not void. Defendant Bell appealed.

¶ 7 On appeal, this court noted that the record did not contain a transcript of the sentencing hearing. In a motion to supplement the record with a bystander's report, counsel for defendant Bell explained that defense counsel never ordered a copy of the sentencing transcript, and the court reporter who recorded the sentencing hearing was deceased. The court found the bystander's report inadequate but declined to consider the sentencing issue waived. Based on his 1978 murder conviction, the court determined that defendant Bell's extended-term sentence was authorized by statute and affirmed the circuit court's finding that defendant Bell's 60-year sentence was not void. *People v. Bell*, No. 1-01-3542 (2002) (*Bell II*) (unpublished order under Supreme Court Rule 23); Ill. Rev. Stat. 1989, ch. 38, par. 1005-5-3.2(b)(1).

¶ 8 On March 2, 2004, defendant Bell filed his third postconviction petition, claiming that the extended-term portion of his sentence was void. On May 7, 2004, the circuit court recharacterized the *pro se* petition as a section 2-1401 petition. The State moved to dismiss on the ground that the relief sought by the *pro se* petition was barred by section 2-1401's two-year statute of limitations. See 735 ILCS 5/2-1401(c) (West 2002).

¶ 9 The circuit court granted the motion to dismiss. The court explained that it chose to treat the *pro se* petition as a section 2-1401 petition so that defendant Bell would not be subject to the requirements for filing a successive postconviction petition, which the court noted he did not satisfy. Acknowledging that it was required to respond to defendant Bell's voidness claim, the

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court found that the 60-year sentence was within the permissible sentencing range and dismissed the petition. Defendant Bell appealed.

¶ 10 On appeal, this court agreed with defendant Bell that the circuit court erred when it *sua sponte* recharacterized his postconviction petition as a section 2-1401 petition, because a void order could be attacked in a postconviction petition. *People v. Bell*, No. 1-04-2647 (2004) (*Bell III*), slip order at 4 (unpublished order under Supreme Court Rule 23). We then determined that the circuit court's failure to rule on defendant Bell's postconviction petition within 90 days of its filing rendered the dismissal order void. See 725 ILCS 5/122-2.1 (a)(2), (b) (West 2002). We remanded the case with instructions that defendant Bell's petition be docketed and that he be appointed counsel. *Bell III*, slip order at 8-9.

¶ 11 On September 13, 2006, the circuit court docketed the petition and appointed counsel to represent defendant Bell. Postconviction counsel requested a continuance to reorder the transcript and file. The record reflects that between September 13, 2006, and March 24, 2009, the circuit court granted multiple continuances to allow postconviction counsel to obtain a transcript from defendant Bell, to consult with him and to prepare a supplemental petition.

¶ 12 On March 24, 2009, postconviction counsel filed a certificate pursuant to Rule 651(c). In the certificate, postconviction counsel stated, *inter alia*, that she had "obtained and examined the Report of Proceedings of the trial and sentencing concerning Indictment Number 90 CR 06381." Counsel further stated that defendant Bell's *pro se* petition adequately set forth his constitutional claims. The State filed a motion to dismiss arguing that since defendant Bell did not seek leave of court to file a successive postconviction petition, the petition was not properly filed and could

not be considered on the merits. The State further argued that defendant Bell's voidness claim had been decided in *Bell II* and was barred by *res judicata*. Finally, the State argued that defendant Bell's voidness claim lacked merit because his extended-term sentence was authorized by statute.

¶ 13 On September 17, 2009, the circuit court heard arguments on the motion to dismiss. During argument, postconviction counsel stated that she had "filed a 651 C petition stating I reviewed the petition, the transcript, and communicated with Mr. Bell, and I found nothing *** to add." There was no mention that the transcript of the sentencing hearing was not contained in the record on appeal. The court granted the State's motion to dismiss. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 A. Standard of Review

¶ 16 Where compliance with a supreme court rule is at issue, our review is *de novo*. *People v. Lloyd*, 338 Ill. App. 3d 379, 384 (2003).

¶ 17 B. Discussion

¶ 18 Rule 651(c) imposes specific duties on postconviction counsel. Pertinent to the issue in this case, the record must demonstrate that postconviction counsel "has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). While postconviction counsel may choose to file a certificate that he or she complied with the requirements of the rule, Rule 651(c) requires only that the record show counsel's compliance with the rule. *People v. Yarbrough*, 210 Ill. App. 3d 710, 713 (1991) ("the court is

not concerned with the presence or absence of a certificate, but with the state of the record").

¶ 19 Appointed postconviction counsel is required to examine as much of the transcript of proceedings as is necessary to adequately present and support those constitutional claims raised by the defendant. *People v. Davis*, 156 Ill. 2d 149, 164 (1993). Defendant Bell's claim concerned his sentencing. There is no dispute that the record did not contain a copy of the transcript from defendant Bell's sentencing hearing. Therefore, postconviction counsel's statement in her Rule 651(c) certificate that she "obtained and examined the Report of Proceedings of the trial and sentencing" is directly contradicted by the fact that the sentencing transcript was not in the record before the circuit court. See *Bell II*, slip order at 3-4.

¶ 20 The record on appeal does not show that postconviction counsel complied with the requirements of Rule 651(c). Therefore, this case must be remanded for compliance with Rule 651(c).

¶ 21 The State raises multiple arguments in support of its position that this court should affirm the dismissal of defendant Bell's successive postconviction petition. As explained below, we are unpersuaded by the State's arguments opposing remand.

¶ 22 The State maintains that, notwithstanding this court's order in *Bell III*, defendant Bell was not entitled to have counsel appointed. The State argues that his successive petition could not be considered filed because he failed to obtain leave of court to file it, relying on *People v. LaPointe*, 227 Ill. 2d 39, 44 (2007). The State reasons that since defendant Bell's petition was never filed, he was not entitled to counsel, and Rule 651(c) did not apply in this case.

¶ 23 In *LaPointe*, the supreme court rejected the defendant's argument that his successive

postconviction petition must be remanded because the circuit court failed to rule on it within 90 days as required by section 122-2.1 of the Act. The court held that a successive petition was not considered filed until the circuit court granted leave to file it in accordance with section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2004) (requiring defendants to establish cause and prejudice for failing to raise claims earlier)).

¶ 24 Unlike the defendant in *LaPointe*, defendant Bell's successive petition alleged that the extended-term portion of his sentence was void. In *People v. Thompson*, 209 Ill. 2d 19 (2004), our supreme court held that a defendant's argument that the extended-term portion of his sentence was void did not depend for its viability on his postconviction petition. *Thompson*, 209 Ill. 2d at 27. Where a defendant's sentence is void, he can attack it for the first time in a successive postconviction petition, even though he failed to raise the voidness claim in a prior petition and failed to show cause for failing to do so. *People v. Ramey*, 393 Ill. App. 3d 661, 671 (2009). Therefore, defendant Bell was not required to satisfy the cause and prejudice test in order for his successive postconviction petition to be considered filed.

¶ 25 Next, the State maintains that postconviction counsel was not required to review the sentencing transcript in order to fulfill the requirements of Rule 651(c). The State argues that postconviction counsel's statements in her Rule 651(c) certificate should be interpreted in light of the fact that it was a matter of record that the sentencing transcript was not contained in the record before the circuit court. However, counsel specifically referred to obtaining and examining the report of proceedings of the trial, including the sentencing, and did not acknowledge in her certificate or before the circuit court that sentencing transcript was not

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contained in the record. Moreover, the State's suggestion that defendant Bell may have given counsel a copy of the sentencing transcript is belied by a 2001 letter from his previous attorney. In the letter to defendant Bell, the attorney explained that he was unable to obtain a copy of the sentencing transcript because the court reporter was deceased and his notes had disappeared. Therefore, postconviction counsel's statement that she obtained and read the transcript of the trial and sentencing stands in direct contradiction with the undisputed fact that the transcript of the sentencing hearing was not contained in the record.

¶ 26 The State then argues that it was unnecessary for postconviction counsel to read the transcript of the sentencing hearing because defendant Bell's claims had no merit. We disagree. In *People v. Suarez*, 224 Ill. 2d 37 (2007), our supreme court held that noncompliance with Rule 651(c) could not be excused on the basis of harmless error because the court's analysis of the rule was driven "not by whether a particular defendant's claim is potentially meritorious, but by the conviction that where postconviction counsel does not adequately complete the duties mandated by the rule, the limited right to counsel cannot be fully realized. [Citation.]" *Suarez*, 224 Ill. 2d at 51.

¶ 27 Finally, during the pendency of this appeal, the appellate defender moved to supplement the record on appeal with the transcript of defendant Bell's sentencing hearing and an affidavit from Pamela Taylor, assistant administrator of the Official Court Reporters, stating that the May 2, 1991, sentencing transcript was not filed with the original transcript. In its appellee's brief, the State maintained that the supplementary materials did not affirmatively demonstrate that postconviction counsel failed to comply with Rule 651(c). After the filing of the briefs, we

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granted the motion as to the transcript but not the affidavit. In deciding this case, we did not consider defendant Bell's supplement to the record. Therefore, we need not address this argument.

¶ 28

III. Conclusion

¶ 29 We conclude that the record does not show that postconviction counsel complied with the requirements of Rule 651(c). Therefore, we reverse the dismissal of defendant Bell's postconviction petition and remand for compliance with Rule 651(c).

¶ 30 Reversed and remanded with directions.

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